Codification of Private International Law in Hungary

Codification of private international law in Hungary has done recently a rather significant step forward. This paper has been intended to offer a brief survey of the work so far done.[1]

1. *The general features of the present phase of private international law in Hungary.* — It is beyond dispute that the time has come when decisive action has become imperative in the codification of private international law in Hungary. There was no question of the need for an all-round codification even before. Efforts mostly attached to the name of Professor *I. Szászy* to cast private international law into a codified form go back in Hungary far into the past. The historical origins take those interested in this codification far back into the years before World War II. Accordingly, pressing for a further evolution, or rather a codification of private international law has lost the attraction of a novelty. Still there are things which are new, and for that matter not even few in number.

Before all new features are the economic, social and international relations to which Hungary has become an acting party. Still as compared to the old there have been changes in the volume of international economic relations and also in the legal order governing many of the spheres of these relations. Yet the stress should not be laid on international passenger or goods transport, which has grown at a hitherto unprecedented rate, although even these items are not negligible. It should be remembered here that the turnover in Hungary's foreign trade accounts for about thirty per cent of the gross national income of the country for many years already.[2] This figure is large enough even to express a ratio, and so is also the absolute value behind it. And for the law the absolute values may also involve problems, before all in the field of legal practice. In addition to these values and ratios it has to be borne in mind that foreign trade is but one of the factors which may give rise to disputes in private international law. The number of cases arising from passenger traffic is continually growing. In tourism, this modern mass migration of peoples, to some extent at least, the foreign exchange position of state budgets is concerned. Through tourism the effect of official cultural exchange tends to multiply, and so also the needs for an administration of justice in a modern sense manifest themselves in ever more emphatic forms. And this not only as far as cases arising from accidents, or small-scale commercial deals, or family ties are concerned, but also in the contractual relations existing between agencies or enterprises professionally engaged in the development of tourist traffic. In particular as far as the latter are interested the urgency of a settlement has reached a stage where with the effective cooperation of Hungary UNIDROIT has put on the agenda the drafting of an international convention governing services and contracts of Tourist Agencies.[3]

One may be tempted to say that all this has long before ceased to be a novelty. As a matter of fact there are international conventions governing passenger transport dating back to many years before and

[1] It is the case of new codification, for the antecedents see the works of MÁDL, RÉCZEI, SZÁSZY and VILÁGHY referred to in Notes 18, 13, 16 and 19.

[2] Development of the index number in million forints 1960 — 139.563 : 21.715, appr. 20 per cent., 1965 — 173.670 : 35.569, appr. 21 per cent. 1966 — 188.150 37.082, appr. 20 per cent. (*Statistical Year-book 1966.* Budapest, Published by the Central Statistical Office, 1967, XII, pp. 421, see pp. 38 and 315). Commonly the 30 per cents referred to are quoted, obviously for the simple reason that the absolute figures of foreign trade have been quoted in exchange rate forints, whereas the national income has been given in local forints. For the purpose of forming ratios the exchange rate forint is calculated on the average with an extra charge of about 100 per cent. As a matter of course the national income derived from foreign trade is not 20, or 30 per cent., but considerably less. In detail: in 1960 4.827 million forints (or in relation to 139.563 appr. 3.5 per cent.), in 1965 10.334 (or in relation to 173.650 appr. 6.5 per cent.), in 1966 9.400 (or in relation to 188.150 appr. 5 per cent.), see *Statistical Year-book*, 1966, p. 38.

[3] UNIDROIT. *Rapport on the Activity of the Institute 1966.* Editions UNIDROIT, p. 35. See a Study Preparatory of the Drafting of Uniform Provisions on Travel Agencies, pp. 18 and 19.

having become classical since. Such an agreement is e.g. the *Warsaw Convention on Air Transport*, or the *International Convention on Transport of Passengers by Rail*. This is true. Still even so the quantitative increase is a phenomenon of the years following upon World War II. There have been considerable changes also seen from the qualitative aspects. Besides the growing number of bilateral agreements on judicial assistance signed in the years after World War II, here e.g. such conventions should be mentioned: the convention on international contracts regarding transport of goods by road *(Convention Relative au Contrat de Transport International de Marchandises par Route CMR)* effective since 1961, the convention on international contracts regarding transport of travellers and luggage by road *(Convention Relative au Contrat de Transport International de Voyageurs et de Bagages par Route, CVR)* of 1961, or the general conditions of deliveries *(Conditions générales)* particularly important for practical purposes, formulated by the European Economic Committee of UNO for a number of specimen contracts.[4]

Still in point of fact novelty is implied not in this, or at least not only in this. In the light of the uncodified stage of Hungarian private international law it has to be taken in consideration that in the socialist jurisprudence, in addition to the recognition of the highly developed state of transport and increasing economic needs, the thesis has been declared and professed, that comprehensive codification, the drafting of codes, or the introduction of legislation in each comprehensive scope of law is a basic requirement, a question of principle. Hence the novelty lies in the discovery of the apparent contradictions between this thesis and the reality in the sphere of private international law. As a matter of fact before World War II, or even before the introduction of the new Civil Code this discovery or contradiction was not pressing for a codification, at least not with the emphasis of the present days. Private law was in general a system of customary law, and attempts of a codification occasionally turning up in the sphere of general private law on the whole suffered defeat. It was, under such circumstances, quite natural that private international law, too, should fail to mature to a stage of codification. Nor were international transport and exchange of goods of a volume and quality like what they have become at present. Furthermore it is a novel feature also that through the agency of COMECON (Council of Mutual Economic Assistance) Hungary has become the participant of a new type of an international division of labour and that this sphere is covered by a unified law of international sale, called *General Conditions of Delivery of Goods*. On the other hand the fact cannot be ignored that not even the *General Conditions of Delivery of Goods* can do without conflict rules, and in particular that about thirty per cent of Hungarian foreign trade is transacted with non-COMECON countries,[5] and that in this highly important sphere the expansion of the channels of the conflict rules is even by the side of the *General Conditions* at all times topical. It is further a novel feature that in Hungarian legal practice there is no Reporter for private international law. There is no systematic public compilation or registration of judgements or court decisions which would rely on the conflict rules of the General Conditions, or which have been

[4] Such are 1. CG pour la Fourniture à l'Importation et à l'Exportation, 1957. II. E. (Mim. 3) 2. CG pour le Montage à l'Etranger des Matériels d'Equipement, 1963 (Publ. des NU, No. de vente: 63. II. E. (Mim. 22)). 3. CG pour la vente International des Agrumes, 1958. (Publ. des NU, No. de vente: 58. II. E (Mim. 12)). 4. CG pour l'Exportation et l'Importation des Combustibles Solides, 1958. (Publ. des NU, No. de vente 59. II. E (Mim. 1). 5. CG de Vente: à l'Importation et à l'Exportation de Biens de Consommation Durables et d'Autres Produits des Industries Mécaniques Fabriqués en Série, 1961. (Publ. des NU, No. de vente: 61. II. E (Mim. 12) 6. Contrat pour la Vente des Céréales No. 7 A.B. No. 8 A,B, 1961 (Publ. des NU, No. de vente: 62. II. E (Mim. 30, Partie 7 A,B, 8 A,B). There are several earlier versions of the CG's, and even those of today cannot be considered definitive.

[5] According to the returns of the *Statistical Yearbook* 1966, pp. 215 and 216, the foreign trade transacted by Hungary in the years 1961—1965 was on average 29.795 million exchange rate forints in the year, and in 1966 37.083 million exchange rate forints, of which about 30 per cent. represent trade with the non-socialist countries, and about 70 per cent. trade with the socialist world.

passed within the framework of other rules of a conflict of laws. In point of fact earlier when there was no pressing need for a statutory regulation of private international law, nor was there a requirement of principle for such a regulation, as a contemporary source of privat international law the practice of the Hungarian Supreme Court was in the then usual form of publication (Reporter of Private Law) nevertheless a recognized source of law. Today, and this is also a novel feature, court decisions are in conformity with the dominant opinion in principle not sources of law. In private international law nevertheless court decisions are recognized as sources of law, although from a theoretical aspect this may appear somewhat like a necessary evil. Earlier this anomaly did not exist. It was believed to be quite natural that a court decision was source of law.

And what is really a new feature: in the wake of the enormous and differentiated development of the international division of labour a large conglomerate of legal sources of private international law of various character has come to light, a conglomerate which almost defies any theoretical delimitation. Many of the theses of these legal sources have inevitably and by natural channels been transplanted into Hungarian private international law, and also into professional literature. These sources of law are arranged on several levels. *a)* One of these is international legislation. Besides earlier conventions or treaties new ones have come into being, many of the earlier ones have been re-formulated, and schemes of outstanding importance have matured to a stage of drafting. Hungary has subscribed to part of these treaties, whereas she refused to do so to others.[6] *b)* Parallel to a general international legislation a process of economic integration of the various geographical regions has unfolded itself, with its looser or closer economic and legal tissues (Common Market, COMECON, EFTA, LAFTA, GATT, etc.). Within the more developed systems of integration the turn has come for a unification of certain spheres of substantive private law, or parts of conflict law. This development has influenced the private international law of the countries concerned in a rather distinct form. As regards Hungary this statement holds as far as the *General Conditions of Delivery of Goods* and other agreements signed within COMECON are concerned. In this respect we face new spheres of law which before were non-existent at all. *c)* In the various geographical regions commercial and consular agreements, further agreements of judicial assistance have been signed with a striking frequency. It is a well-known fact that all these agreements contain a large number of conflict rules. Hungary has signed most of her agreements within this scope during the latter twenty years.[7] *d)* In the course of economic cooperation and integration within the sphere of the COMECON countries, moreover between socialist and non-socialist countries, joint economic institutions (common bank, joint venture enterprises, bureaux, etc.)[8] have been formed. The par-

[6] *Conventions en matière de droit international privé. Acte final de la Conférence de la Haye de Droit International Privé, signé à la Haye le 31 Octobre 1951.* Septième session: *I.* Projet de convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels (12 art.). *II.* Projet de convention concernant la reconnaissance de la personalité juridique des sociétés, associations et fondations étrangères (14 art.). *III.* Projet de convention pour régler les conflits entre la loi nationale et la loi du domicile (13 art.). *IV.* Projet de convention relative à la procédure civile (33 art.); UNIDROIT *(Institut International pour l'Unification du Droit Privé.* L'Unification du Droit — Aperçu général des travaux pour l'unification du droit privé. — Projets et Conventions, 1947—1952. Troisième vol. de la série. Rome, Éditions UNIDROIT, 1954, p. 783, pp. 670 to 689), *V.* Conventions du 15 avril 1958 sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels (15 art.); MAKAROV, A. N.: *Recueil de textes concernant le droit international privé — Quellen des Internationalen Privatrechts.* Bilinguisch. Herausgegeben vom Max Planck Institut für Ausländisches und Internationales Privatrecht. Berlin, Walter de Gruyter Co. — Tübingen, J. C. B. Mohr, Bd. I. Gesetzestexte, 1953. XXXVI—62. Staaten und Anhang, in Englisch (61 p.). Register bilingual (96 p.), Bd. III. Texte der Staatsverträge, 1960 LIV, 1079 pp., Vol. II pp. 543 to 550.

[7] In detail see M. VILÁGHY, p. 34. (in footnote 19). The most complete compilation of the treaties on judicial assistance signed between a socialist state and another has been taken up in MAKAROV's work, Vol. II, Items 12 to 28, pp. 162—304/64.

[8] Under *ad hoc* interstate agreements (with the respective statutes in the appendices) joint venture enterprises have been formed, such as INTERMETALL (organization for cooperation in iron metallurgy), the Polish-Hungarian joint enterprise HALDEX, the joint Bulgarian, Hungarian, Polish, German and Czechoslovak

ticular bilateral, or multilateral agreements relating to these, the statutes of these institutions, etc. have contributed a number of new elements to the development of private international law, even when as regards joint enterprises for want of something better quite often reference is made to forms of corporations as defined by earlier commercial legislation. However, in view of the departure of the legal regulation as laid down in these particular agreements or company statutes of joint venture enterprises from earlier legislation, still mainly for the differences existing in substantive law, it appears to be preferable, and even suggested by the predictable rapid expansion of international economic relations in the COMECON sphere, to prepare a uniforme agreement of substantive law also for what are called European or COMECON enterprises or companies. It is by no means accidental that a uniform European company convention is just being drafted by the European Economic Community. All this is an indication of that the time has come for a scientific study of the issue also in Hungary *e)* As regards both the spheres of foreign trade,[9] not brought under regulation by these agreements (in the first place the so-called West-East trade), and passenger transport, financial transactions of citizens, also the local needs of the country have called for a statutory regulation of some the problems at least. Here in the first place the decree governing foreign trade agreements,[10] or the conflict rules in the Family Code[11] or the rules relating to foreign commercial representation contracts,[12] etc. should be remembered. *f)* In the practice of arbitration and that of the ordinary courts, further in practice as established by contracts effectuated in the regular manner and not coming up before court, positions have been taken which by way of legal custom so to say strengthened to legal institutions have come to belong to the body of present Hungarian private international law growing in a rather amorphous manner.

This proliferation of the sources of Hungarian private international law visibly presents the picture of a motley-coloured conglomeration. The role of the particular elements of this picture as related to the body as a whole is not known with sufficient accuracy. At least jurisprudence has so far failed to grasp the real totality of the forms of existence of private international law, or to discover the many pillars of the legal order on which these elements rest. *E.g.* there is no exact assessment of the actual situation in judicial and extra-judicial practice, nor of how a general rule or another of the written sources of law radiates into sphere of private international law so far outside the control by treaties or legislation. Naturally there is no need for the creation of some sort of an absolute and systematic order as far as the various sources of law are concerned. In fact the main drift and the principal side branches of private international law are anyway shaped in the sign of an order and expediency as demanded by reality, in general through the intervention of the legislator. The decisive elements, the principal parts, are ready and present. All that is wanted is the codification of the general tissue of private international law. Such a codification would cast the institutions of private internation-

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Organization for Cooperation in the Bearing Industry, the two Bulgarian-Hungarian joint enterprises INTRASMASH and AGROMASH. The agreements and statutes have been published by the Institute of Political Sciences and Law of the Academy of Sciences of the USSR: *Mnogostoronnoe ekonomicheskoe sotrudnichestvo socialisticheskikh gosudarstv.* Moscow, Izdatelstvo Yuridicheskaya Literatura, 1967, pp. 307.

In East-West trade by the name *Sigma Italiana* a common Czechoslovak-Italian enterprise has been formed for the sale of pumps and similar equipment in the world market. See Gy. ÁDÁM: *Új vonások a kelet—nyugati gazdasági kapcsolatokban (New Traits in the Economic Relations between East and West)*, Gazdaság, Vol. 1/1967, No. 1 p. 72

[9] Research work of this sort has been set on foot by the present author in the Institute of Legal and Political Sciences of the Hungarian Academy of Sciences, Budapest.

[10] *Decree 1/1960. KKM of the Hungarian Minister of Foreign Trade on the definition of foreign trade contracts and the regulation of certain questions associated with foreign trade activities*

[11] *Law Decree No. 23 of 1952 of the Presidial Council on the introduction of Act of Family Relations (Act IV of 1952).* Sections 42 and 44 of the introductory act contain conflict rules. As regards disposing capacity it refers to local law, it defines the content of local law, etc.

[12] *Instruction No. 21 of the Minister of Foreign Trade on contracts of representation.*

al law so far brought under regulation partially only, or not at all, and proliferating in practice so to say spontaneously, into more definite forms. It would complete, and help to create, a general Hungarian private international law by way of legislation. A more definite intrinsic order would be established by this codification between the various sources of law. It would serve as guidance in the inner order of Hungarian private international law as a whole. The simple question is, that it is timely to bring into being a Hungarian code of private international law as has already been done in Czechoslovakia, the Soviet Union and Poland.

2. *The function of Hungarian jurisprudence in the evolution of private international law.* — Hungarian writers were not late in recognizing the need for a gradual development of private international law. The standard work of *L. Réczei*[13] was the first stop after World War II to develop private international law and conflicts theory in Hungary among socialist social and economic conditions, and the all-round systematization of the institutions of private international law as established by practice. As a matter of course at the time of the codification of private law it was clear that the time had matured also for the codification of private international law either within the framework of the Civil Code, or by a seperate law. On grounds of expedience it was thought that private international law should preferably be brought under regulation by special legislation.[14] From this time on further actions were taken in the way of preparing the path for the codification of private international law. It was not only practice which helped to bring the demand for a code to a state of maturity, or to point out the trends in growth and evolution of private international law with greater emphasis. (Here the transplant of the rules of private international law as incorporated in the *General Conditions of Delivery of Goods* to the sphere of general private international law, or judicial and contractual practice, the evolution of the autonomy of will as formulated in a rather interesting way in the act of commercial representations abroad, etc. should be remembered). Beyond these Hungarian literature of private international law has made remarkable progress also in the preparation of the soil and conditions for a codification. In addition to the many excellent papers here attention should be called forth to a number of books written on the subject-matter.

Important contributions have been made to the evolution and formulation of Hungarian private international law by the section of private international law of the Hungarian Lawyers' Association. In over hundred sessions of the section various positions of the new Hungarian conflicts law have been developped. The scientific results of the debates have become part and parcel of Hungarian private international law, also for the very reason because part of the papers read in the debates has been edited by *Gy. Simon* and published in three volumes.[15] A landmark is the work of *I. Szászy*, published also in English, *Private International Law in the European People's Democracies.*[16] In addition to a theoretical analysis of the principles of private international law this work is before all of significance because it analyses in the form of a comparative study the practice of the European socialist legal systems followed in private international law (international

[13] L. RÉCZEI, *Nemzetközi magánjog (Private International Law)*. 3rd edition. Budapest, Tankönyvkiadó, 1961, 361 pp. The 1st edition was published in 1955, the 2nd revised edition in 1959. Published in German as *Internationales Privatrecht*. Budapest, Verlag der Ungarischen Akademie der Wissenschaften, 1960, 478 pp.

[14] In this respect the same considerations have prevailed as in association with intellectual products, i.e. that regulation by special legislation appears to be convenient. See *Section V of the General Motivation of the Civil Code.*

[15] *Jogi problémák a nemzetközi kereskedelemben (Legal Problems in International Trade)*. Edited by Gy. SIMON, Budapest, Közgazdasági és Jogi Kiadó, 1957—1959, pp. 258, 383. *Nemzetközi gazdasági kapcsolatok jogi kérdései (Legal Problems of International Economic Relations)*, Edited by Gy. SIMON, Budapest, Közgazdasági és Jogi Kiadó, 1963, 386 p.

[16] The Hungarian edition of 1962 was followed by an English edition in 1964: *Private International Law of the European People's Democracies.* Budapest, Publishing House of the Hungarian Academy of Sciences, 1964, 403 p.

treaties, legislation, judicial practice), and the results of legal literature. By his work Professor *Szászy* has contributed extensively to basing codification work of Hungarian private international law on the firm foundations of current information. Next in order follows the work also by *I. Szászy, Internationational Civil Procedure*, published in English and Hungarian,[17] a publication which in significance exceeds the earlier in two senses. Firstly, beyond the discussion of the various international treaties, besides the international civil procedural rules of the socialist countries the work extends to a comparative analysis of the procedural rules also of the capitalist countries. Secondly, in most of the problems of principle it offers a monographic analysis and a theoretical definition of the concepts. Although the work has not been meant to become a preparatory stage towards codification, it stands to reason that it has clarified the underlying scientific principles for the procedural section of the draft code. Expressly in the sign of preparatory work of codification the book of the present author *Foreign Trade Monopoly — Private International Law*, in English and Hungarian,[18] has been published. The object followed by this work is in addition to a presentation and analysis of the legal mechanism of the foreign trade monopoly and other institutions of general international commercial law to define the positions in the principal questions of the codification of Hungarian private international law in the form of a theoretical analysis. It is in this sense that the work extends to the general rules, to persons, to ownership, the law of intellectual property and contract law. Finally, though not directly associated with the codification of private international law, still recognizing the importance of this sphere of law on a scientific-didactic level, after a pause of several years instruction in private international law has again been taken up in the faculties of law as a principal course of study. Formally a product of this change in attitude is the work of *M. Világhy*.[19] Although as the author himself pointed out[20] at the time of publication, initial steps towards codification had already been taken, he hoped that the position he had taken in several question could still be considered in the course of subsequent legislative work.

Actual codification was taken up after the historical-practical needs for a definition of the scope of private international law had been satisfied and the conditions brought about by theoretical preparatory work. This was one of the most essential elements of the process which in its totality may without exaggeration be greeted as a new phase in the evolution of Hungarian private international law.

3. *Initial phase of the codification of Hungarian private international law; principal features of the draft code.* — Codification was entrusted to a committee composed by representatives of the government departments concerned in cooperation with other central agencies and representatives of legal science working in this field within the *Institute of Legal and Political Sciences of the Hungarian Academy of Sciences*. The committee asked Professor *I. Szászy* and *F. Mádl* to prepare the first draft. After a discussion in general and in detail the draft was then cast into a new form by *F. Kreskai*. In this new form the positions taken in certain problems in the debates on the original draft were already considered. Naturally this meant only that the process of codification had passed the first decisive phase. It was thought that no matter what the fate of the draft would be it nevertheless remained a landmark in Hungarian legal history. The principal theses and positions defined in the course of drafting would evidently be decisive in the evolution of

[17] The Hungarian edition was published in 1963, the English edition: *International Civil Procedure*. Budapest, Publishing House of the Hungarian Academy of Sciences, 1967, X. 708 p.

[18] F. MÁDL, *Foreign Trade Monopoly — Private International Law*. Budapest, Publishing House of the Hungarian Academy of Sciences, 1967, 170. p.

[19] M. VILÁGHY, *Bevezetés a nemzetközi magánjogba (Introduction into Private International Law)*. Budapest, Tankönyvkiadó, 1966, 234 p.

[20] VILÁGHY, op. cit. p. 31.

practice and theory of Hungarian private international law.

Although codification was by no means a novel feature in the growth of private international law in Hungary, this codification was certainly a novelty, and this not only for its form, but also for the many institutions defined by it. Here before all the original form of the manifestation of the party autonomy or *choice of law*, or the repercussions of the foreign exchange law on the validity of a transaction, a circumstance which from necessity turned up in the draft, should be remembered. What was exactly the problem *e.g.* as far as the party autonomy (choice of law) was concerned, was whether apart from the sphere of action of the party autonomy, or its reasonable limitations, only the idea should be considered to what extent the parties should be free, or whether they should have freedom in the choice of law applicable to their contract at all, and so on.

In socialist practice and jurisprudence, especially in the earlier years, the position was firmly defended that the parties could not be granted this right, *i.e.* the freedom of the choice of law, partly on formal grounds. If this were allowed, in statutory law so to say a vacuum would be created, *i.e.* a situation would be apt to arise for which the legislator had pronounced no definite legal instructions. An argument of formal character was the logical objection that it was not consistent on the part of the legislator, firstly, to bring cases of private international law under detailed regulation, and, secondly, then to declare somehow in the form of a rider, that the parties, according to their will, may or may not respect the rules as defined by the statute. Of all provisos two may have something to say. According to the one the party autonomy relied on the ideological soil of economic liberalism and philosophic individualism, both of which ran counter to the socialist idea of law. In its variant of today the party autonomy was one of the elastic categories of monopoly capitalism, the tool by which capitalists are assisted in their efforts to ensure a freedom of action for themselves Secondly, it was pointed out that the guarantee of a freedom of the choice of law would favour the party in possession of the greater economic power, *i.e.* in most of the cases the mammoth capitalist corporations. In fact these could always persuade the other party to accept their law if there existed a freedom of the stipulation of the law governing the contract.[21]

In the course of codification the opinion asserted itself that socialist private international law had in both practice and theory surpassed the actual conditions covered by this approach, in fact it had even overcome the restrictions expressed by this approach. The growing strength of the socialist world market, the hitherto unknown degree of an international division of labour, the principle of peaceful coexistence, firstly, insisted on an elastic and dynamic economic policy, secondly, provided a firm underlying principle among others also for a law which guaranteed an elastic freedom of action in international trade for the strong socialist foreign trade enterprises. The arty autonomy had to be subordinated to the actual needs of an international division of labour and the political considerations of foreign trade. During the past years, in particular in the practice developed in the sixties, it became evident that the complete arty autonomy was useful and indispensable for foreign trade and the market activities of the foreign trade enterprises. Indirectly the granting of full autonomy would be useful even if in the majority of cases the stipulation of Hungarian law could not be guaranteed. It had already been recognized that in a large number of cases in addition to a profitable deal also the law of the other party had to be accepted. In the light of this situation it would be mere quibbling about paragraphs to declare that the authorization of a free choice of law was incorrect because it would lead to the recognition of the stronger foreign

[21] The earlier position taken by socialist literature in the matter of autonomy is critically presented by MÁDL, op. cit., pp. 99 et ssq.

law. Besides the circumstance that a prohibition of autonomy would in part of the cases bring about the loss of an economically justifiable transaction, it was by no means certain whether in all cases Hungarian law held out the greatest advantage to the Hungarian party. For that matter it was thought, it was illusory to believe that a struggle against the capitalist mammoth concerns could be successful only at the expense of a prohibition of the freedom of choice of law. An essential factor was rather the strengthening and development of foreign trade. This could act as a counterweight in competition with the capitalist world. And here the suppression of autonomy would mean a drawback rather than assistance. Essentially these were the considerations which in the foreign trade practice of the socialist countries, in the treaties signed by them, and in their recent codifications of private international law eventually led to a general recognition of the free choice of law. In the light of these facts earlier formal counter-arguments lost their acuteness. It was obvious to those compiling the draft code that the recognition of the autonomy did not mean the creation of a legal vacuum. It was recognized that all what autonomy implied was that on certain conditions the legislator authorized the parties to decide in favour of a definite legal system. In fact it was agreed that the parties could not choose a legal vacuum, even when on the plea of a choice of law a so called *self-regulatory* contract would be imaginable, *i.e.* a contract which would so to say incorporate a complete code of remedies for any conceivable ailment of the contract.[22] The logical objection was owing to its formal character of a relative value only. In general it was understood that in law the rules of logic did not assert themselves directly. In particular a statement that law had to be consistent in all questions of detail appeared to be preposterous. Law was not logic and statutory law had to be logical on considerations of legal policy only. Anyhow no logical contradiction was implied in the freedom granted by the legislator within the sphere of regulation of certain questions of private international law to the parties to the contract to decide in favour of another concrete legal system. This was not the case because statutory conflict rules, too, did not force a concrete and exclusively admitted, save some *jus cogens* rules, settlement under substantive law, but chose some sort of a legal system for the definition of the legal relation in question for the case that the parties did not stipulate any special set of rules for their legal problem, for their contract in general. It would be illogical to deny the peculiar manifestation of permissive legislation in the law of conflicts in a sphere of law like private law, where this freedom is one of the fundamental principles even as far as substantive law was concerned.

After the recognition of the idea of the autonomy the question next to be answered was, whether the draft should recognize a freedom of the choice of law as a conflict law institution (meaning the freedom of stipulating any foreign law as a whole), or restrict this freedom to the stipulation of corresponding and expressly defined substantive law rules of a certain legal system. The consistent action was to recognize the autonomy as conflict law institution. It was thought that the freedom of choice of law in the sense of substantive law, which essentially was but the *brevitatis causa* designation of the wanted legal effects within the framework of permissive substantive legal rules, in point of fact did not amount to a recognition of the party autonomy, moreover it was not even the same thing. For this reason the restriction was justly discarded at the very outset. A further question to be settled was whether autonomy should be taken up in the code with or without limitations. As was known the dogmatic condition of limited autonomy was that the legislator himself should specify the connecting factors or considerations according to which a law could be stipulated by the contract, and at the same time

[22] For a detailed analysis of the self-regulatory contract see MÁDL, op. cit. pp. 111 et ssq.

the limits which must not be transgressed. *E.g.* the parties would be authorized to choose a law only which by way of anyone of the elements of the deal could reckon with being recognized as governing law in the legal relation at all. This dogmatically and logically reasonable consideration received recognition in the statutory provisions enacted by a number of countries. However, the majority of countries recognizing autonomy did not apply a limitation of this sort at all. This was the policy followed for several reasons, and in the first place because it had become a fairly general practice, just in East—West trade, to stipulate the law of a third country. This was the case partly when the country whose law had been stipulated had a well developed legal system in the sphere in question, or because it had established traditions in arbitration, or because it was a politically neutral country. (Essentially this explains why in East—West trade so often Swiss or Austrian law is stipulated.) It was concluded therefore that the consistent settlement of the problem was to recognize the autonomy of will in general without limitations. It was only by this way that autonomy would be subservient to the ends of a commercial policy for which the institution could be approved at all. It was an altogether different question whether or not certain choices of law made patently in bad faith should in particular for the safeguard of the rights of this persons be placed under a statutory ban. Still another question was where the line should be drawn of the sphere of power of autonomy. Obviously a choice of law conflicting with public policy could not be accepted as one producing the desired legal effect. Yet another question was to determine the cases which from the very outset were outside the sphere of autonomy. Such were *e.g.* the effects of a right *in rem*, or, for want of an express disposition of the parties, the formal requisites of a contract. All these were of course problems of policy-making and of positive law, which by way of codification could be settled with general validity, or which for want of a code or statutory regulation had in each case be decided by judicial practice segregated from one another. Still it was concluded that in both instances it had to stand out clearly that the recognition of autonomy and the limitation of full autonomy were two different things. Yet another thing was the definition of the sphere of effectiveness of autonomy as understood in the one or the other sense.[23]

In all certainty it was a momentous step forward towards the goal when in the course of preparatory work on the draft the opinion eventually prevailed that the practicable course was to give full recognition to autonomy and to define the sphere of its effectiveness differentiated according as required by the nature of the particular problems.

As regards the policy-making and scientific considerations defining and specifying codification, *i.e. the principles of codification*, these may be summed up in a concise form as follows.

One of the general considerations was that the code should preferably *embrace the whole sphere of sui generis conflict law relations*. *I.e.* the code should not be confined merely to specifying the conflict rules of private law, but it should be worded so as to include the conflict rules of labour law, the law of family relations and civil procedure. Within the sphere of private law the conflict rules of the law of banking and financial transactions and of intellectual property should also be brought under regulation.

A consideration determining the *method and level of regulation* was that codification could not be built upon the one connecting factor, or the other, or on some sort of an abstract thesis. In this respect those in charge of the work had to set out from the requirements which resulted from the economic and social reality of Hungary and the development of Hungary's international relations.

[23] For a detailed discussion of the position taken in favour of autonomy in Hungarian literature see MÁDL, op. cit., pp. 93 et ssq.

The other methodological principle emphasized that for a contemporary presentation of the demands of reality it was logical and at the same time necessary to take into consideration opinions and solutions which in international codification (in the various international treaties), in bilateral treaties on judicial assistance, commercial and consular treaties, in the private law conventions and the literature of both socialist and non-socialist countries established themselves. It was believed that this *approach of comparative law* would help to a success the endeavour that Hungarian legislation in private international law should simplify the legal channels through which international economic transactions passed rather than introduce into them contradictions, complexities and a heterogeneity of a nature more critical than before. This would mean that Hungarian legislation should partly approximate the known solutions as far as its content was concerned, or where it was convenient, enact identical provisions, partly strive for a simple and reasonable synchronism with the solutions of other laws also in the sphere where regulation was divergent.

Another methodological consideration was that *for relations uniform in reality conflict law should preferably decree the application of a single legal system* and should not from the very outset take another position, *e.g.* in questions of the material and formal chances of contracts, or the ownership or contract law relations of commercial ships and civil aircraft. In other words it was held that wherever possible instead of a proliferation of legal systems so well known in private international law, the goal was a preferably uniform and patently simple solution of all problems. This was given expression in the general principle that when a principal rule enacted for the type of relation in question was not applicable for the one reason or the other, then the law of the forum should be applied, or in certain cases, instead of having recourse to remission without any reason of principle (and here not *renvoi* in the narrower sense was thought of) the statute should cut the *Gordian* knot with a direct rule. A case of this type was considered *e.g.* the clear-cut definition of the site of the making of the contract. As a matter of fact it was concluded that when the law referred several problems of contract law to the law of the site where the contract was concluded, before all a firm indication was needed as to when a contract could be considered concluded. Only then the country could be established to whose *lex loci contractus* this indispensable last element of the contract tied the transaction. Since a contract was considered concluded by the particular legal systems on principles differing from one another, *i.e.* conditions differing from one another have to exist for the validity of a contract, the mere stipulation of the *lex loci contractus* by itself would be meaningless, moreover, would lead into a vicious circle, so that direct rules appeared to be called for.

It was part and parcel of regulation that as far as the particular institutions of law were concerned, *for institutions segregated under substantive law* (*e.g.* the various types of contracts) *individual provisions should be enacted by the side of the general rules.* Endeavour of legal security could not, however, be made absolute. In fact *summum ius* might as well change over to *summa iniuria*. It was decided that private international law was in particular the field where the judge should be allowed as much free movement as reasonable. In point of fact the freedom of action of the judiciary would often produce settlements more justified and on principle even more correct than a statutory provision permitting a single response only to the exclusion of all others. Here only the two important spheres of fort liability for a tort and of enterprise liability should be remembered. It could not be taken for granted by any means that a rigidly formulated *lex loci delicti commissi* favoured the interests of the consuming, travelling public. Moreover often the abandonment of the principle of the *lex loci commissi* was expressly desirable for

the better safeguard of the interests of the consumers.[24]

A more detailed and topical analysis of the codification should preferably be postponed to after the promulgation of the Code.

F. MÁDL

Legal Erudition in Hungary Preceding the Ratio Educationis, in the Enlightment and the Reform Epoch

(The 9th Czechoslovak-Hungarian Conference of Legal History — Smolenice, November 10—12, 1966)

1. In the line of the traditional Czechoslovak-Hungarian exchange of views in the field of legal history the 9th Conference was held in November 1966 in *Smolenice*. The date of the Conference coincided with the commemoration of the five hundred years anniversary of the creation of the *Academia Istropolitana* and of the three hundred years anniversary of the Law School of the University of Nagyszombat, today *Trnava*. On the side of the hosts the members of the Institute of Legal Sciences of the Czechoslovak Academy of Sciences, of the legal history departments of the Komensky and Charles Universities, as well as of the State archive and record office prepared reports for the Conference. On the Hungarian side there were lectures delivered by the members of the legal history department of the Hungarian Lawyers' Association, respectively the legal historians of the Universities of Budapest and the country, as well as the officers of the archives. The organizing committee has invited Polish, Soviet, Yugoslav, East German, Bulgarian, Austrian, French, West German and other well known legal historians, and the most of them have sent their reports, respectively took part in the discussion. On the other hand the specialists of the related fields have already previously discussed with the participation of legal historians the history of the *Academia Istropolitana*, in this Conference, however historians, specialists of roman law, and others have collaborated, too.[1]

The first issue placed on the agenda was the question of the problem of the development of legal science and legal education preceding the *Ratio Educationis*. The reports following this item put on the agenda dealt with the effects of the ideas of the enlightment on the legal erudition. Finally they examined the changes undergone in the education of lawyers at the beginning of the 19th century.[2] The delimitation of the problems could not be realized with perfect precision neither on the basis of temporal criteria nor according to subject-matters. On the Conference about thirty reports were prepared, the multiplied copies of which were in advance distributed among the participants. In addition many other speakers took part in the discussions.

In the following I shall deal with the Hungarian participation in the Conference and the Hungarian relations.

2. As to the first topic the reports offered a large scope for the demonstration of the role of the Law School established at the beginning of 1667 and of the law schools founded in the next century. In this subject-matter Professor *A. Csizmadia* (Pécs) analysed, in connection with the instruction of the "domestic law", the charac-

[24] See F. MÁDL, *A magyar nemzetközi magánjog új utakon (Hungarian Private International Law on New Pathways)*. Acta Iuridica, Vol. 1968, Nos. 1 & 2. pp.

[1] E. KOVÁCS, *A smolenicei Academia Istropolitana-konferencia (The Academia Istropolitana Conference in Smolenice)*. Századok, 1966, No. 2—3. pp. 639 et seq.; A. VANTUCH, *Vedecká konferencia* k 500. vyročiu založenia Akadémie Istropolitany — humanismus a renesancia. Historický Časopis, 1966, No. 2. pp. 322 et seq.

[2] *Les études de droit jusqu'à la Ratio Educationis: L'influence du siècle de lumière à la culture juridique: La culture juridique dans les années 1805—1848.*